CONCRETE PARADE SDN BHD v. APEX EQUITY HOLDINGS BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[ORIGINATING SUMMONS NO: WA-24NCC-56-02-2019]
11 SEPTEMBER 2019

COMPANY LAW: *Oppression – Oppression of minority – Conduct amounting to oppression – Allegation of – Company's acts of seeking and obtaining order of High Court to validate prior share buy-back transaction without giving adequate notice to shareholders – Whether amounted to act of oppression – Whether private placement exercise contravened shareholder's rights of pre-emption under s. 85 of Companies Act 2016 – Whether dilutive effects of private placement oppressive of shareholder's rights – Whether there was contravention of s. 223 of Companies Act 2016 – Whether shareholder demonstrated any prejudice to its rights to avail itself of remedies under s. 346 of Companies Act 2016*

CIVIL PROCEDURE: *Originating summons – Oppression suit – Oppression of minority – Conduct amounting to oppression – Allegation of – Company's acts of seeking and obtaining order of High Court to validate prior share buy-back transaction without giving adequate notice to shareholders – Whether amounted to act of oppression – Whether private placement exercise contravened shareholder's rights of pre-emption under s. 85 of Companies Act 2016 – Whether dilutive effects of private placement oppressive of shareholder's rights – Whether there was contravention of s. 223 of Companies Act 2016 – Whether shareholder demonstrated any prejudice to its rights to avail itself of remedies under s. 346 of Companies Act 2016 – Whether originating summons ought to be dismissed*

The plaintiff, a shareholder in the first defendant, Apex Equity Holdings Berhad ('Apex Equity'), brought an action against the defendants for minority oppression under s. 346 of the Companies Act 2016. The complaint of oppression and unfair discrimination emanated from two discrete sets of transactions. The first related to certain share buy-back transactions that had been conducted by Apex Equity between 2005 and 2017, and the second was the proposed merger of the stockbroking business of a subsidiary of Apex Equity, the second defendant, JF Apex Securities Berhad ('JF Apex') with the business of Mercury Securities Sdn Bhd ('Mercury.') Apex Equity and JF Apex entered into a business merger agreement with Mercury. Under the terms of this agreement, Mercury was to transfer its stockbroking business to JF Apex. The consideration for this business transfer would be (i) RM48 million to be paid in cash, which was to be funded by the proceeds of a private placement of new shares to be issued and allotted by Apex Equity;

and (ii) RM92 million to be satisfied by the issuance of new shares in Apex Equity to Mercury. As a result of the business transfer, Mercury would emerge as the largest shareholder in Apex Equity. The business merger agreement was not yet completed as the condition precedent requiring an order of the High Court to vest the assets and liabilities of Mercury to JF Apex had not yet been fulfilled. All other conditions precedent had been fulfilled, including the requirement to obtain shareholders' approval for the transactions contemplated by the proposed acquisition of the business of Mercury. The gist of the plaintiff's claim was that (i) the share buy-back transactions were the memorandum of association of Apex Equity, and the acts of Apex Equity to seek and obtain an order of the High Court validating the prior share buy-back transaction without giving adequate notice to its shareholders amounted to an act of oppression; (ii) the private placement exercise – which formed part of the larger transaction involving the injection of Mercury's business into JF Apex – contravened the plaintiff's rights of pre-emption under s. 85 of the Companies Act 2016 ('Companies Act'), and the dilutive effects of the private placement meant that it was oppressive of the plaintiff's rights *qua* shareholder in Apex Equity; and (iii) the business merger agreement, as well as the heads of agreement that had preceded it, contravened s. 223 of the Companies Act and as a consequence were void.

Held (dismissing plaintiff's originating summons):

(1) In order for a plaintiff to succeed in an action for minority oppression, it must be shown that there had been unfair discrimination against the shareholder in question. On the facts of the present case, the manner in which the validation order was obtained did not impinge upon any substantive right of the plaintiff *qua* shareholder in any manner that materially affected its interests. There was no suggestion at all that the share buy-back transactions were undertaken in wilful disobedience of the memorandum and articles of association. The plaintiff did not claim that its financial or commercial interests were adversely affected by the share buy-back transactions or by the continued holding of the shares as treasury shares. Although there had been a deprivation of the plaintiff of its right to object to the application for validation, even if the court in the validation proceedings had upheld the objection and refused the application for the validation order, how could the plaintiff be better off in such circumstances? Given that the share buy-back transactions must necessarily had been conducted on the open market, it would be next to impossible to reverse the transactions. The refusal of the validation order would have created even more uncertainty as to the status of the shares. Thus, any objections that the plaintiff may have raised at the validation proceedings could not have made any difference to the outcome of those proceedings in a manner that would materially affect

the interests of the plaintiff in its capacity as a shareholder of Apex Equity. None of plaintiff's substantive rights as a shareholder in Apex Equity had been materially prejudiced. (paras 9 & 34-37)

(2) The shareholders had approved the issuance of the placement shares to the placees, which by its very nature would result in a dilution of the holdings of the existing shareholders. The fact that the shareholders in a general meeting had approved for their holdings to be diluted meant that they were prepared to accept the consequences of the proposed transaction. If the shareholders as a whole were prepared to accept that their holdings would be diluted, then the fact that the circular did not spell out that the approval of the transaction would have the effect of waiving their rights of pre-emption would be of no particular consequence. The effects and consequences of the proposed transaction was adequately explained in order for the shareholders to make an informed decision regarding the transactions under contemplation. For as long as they knew that the effect of the transaction would be a dilution of their shareholdings, then that was all that mattered for their resolution to take effect as a 'direction to the contrary' within the meaning of article 11 of Apex Equity's articles of association. (para 49)

(3) An oppression action under s. 346 of the Companies Act 2016 is not a class action undertaken by one shareholder for the benefit of the shareholders as a whole. Thus, the plaintiff could not claim that it was oppressed because the shareholders as a whole was not informed of their right of pre-emption. What mattered was whether the plaintiff knew that an approval of the transaction would effectively result in a waiver of its pre-emptive rights. It clearly did, for that was the basis upon which it sought to challenge the proposed business merger even before the general meeting was convened. The plaintiff could not complain that it was not told of the existence of its pre-emptive rights and that the approval of the transaction would result in an effective waiver of its pre-emptive rights, because it knew this all along. Further, a majority of the shareholders had already approved the proposed business merger transaction. The plaintiff may well disagree with the decision of the majority, but this disagreement in and of itself should not entitle the plaintiff to frustrate the will of the majority. Thus, none of the allegations of oppression had been made out in respect of the purported contravention of s. 85, which meant that the plaintiff must abide by the wishes of the majority. (para 49)

(4) Section 223(1) of the Companies Act is satisfied either where the shareholders' approval had been obtained up front *ie*, before any document is executed between the parties, or where shareholders' approval had been made a condition precedent to the effectiveness of the rights and obligations relating to the substantial transaction. On the facts, because the business merger agreement specified shareholders' approval as a condition precedent to completion of the proposed acquisition of Mercury's business, there had been no contravention of s. 223(1) of the Companies Act. On the true construction of s. 223(1) of the Companies Act, an arrangement or transaction is only subject to the shareholders' approval if it has the effect of creating enforceable obligations on a company to either acquire an asset of substantial value or to dispose a substantial portion of its assets. Even though the heads of agreement was expressed to be legally binding, it did not have the effect of committing the parties to the sale and purchase of the business, and was thus not subject to the requirement for shareholders' approval under s. 223(1). Even if the heads of agreement was in contravention of s. 223(1), it had been superseded by the business merger agreement, which in turn had been made subject to shareholders' approval, and hence was in compliance with s. 223(1). The heads of agreement thus no longer had any force or effect, and accordingly the question of whether the heads of agreement was void was academic. There could not conceivably be prejudice to the plaintiff, if Apex Equity could have arrived at exactly the same position had it made the heads of agreement subject to shareholders' approval. No commercial or regulatory purpose would have been served by requiring shareholders' approval to be obtained twice in respect of the same transaction. The plaintiff thus had not demonstrated any prejudice to its rights as a shareholder in order to avail itself of the remedies under s. 346 of the Companies Act. (paras 9 & 58)

Case(s) referred to:

Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors [1993] 1 LNS 32 HC ***(refd)***

Ng Chee Keong v. Ng Teong Kiat Highlands Plantations Ltd [1979] 1 LNS 59 HC ***(refd)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***

Winds Ridge Farms Ltd v. Quadra Group Investments 178 DLR (4th) 603 ***(refd)***

Legislation referred to:

Capital Markets and Services Act 2007, s. 139

Companies Act 1965 (repealed), ss. 67, 67A(1), 132C, 181

Companies Act 2016, ss. 85, 123, 223(1)(a), (b), (A), (B), (5), 346(1)(a), (b), (2), 582(3)

For the plaintiff - Robert Lazar, Alvin Tang & Khor Heng How; M/s Bodipalar Ponnudurai De Silva
For the 1st & 2nd defendants - Mak Lin Kum, Himahlini Ramalingam, Mohamed Izzul Faris & Lee Shiow Chi; M/s Himahlini & Loh
For the 3rd to 5th defendants - Kennie Ang & Darren Lai; M/s Ivan Ang Lau & Xuen
For the 6th & 7th defendants - Ong Jian Ne; M/s Kadir, Andri & Partners
For the 8th defendant - Richard WG Lee, Shiyamala Devi Manokaran & Soon Jia Yee; M/s Jeff Leong, Poon & Wong
For the 9th & 12th defendants - Shim De Zhen; M/s De Zhen
For the 10th defendant - Yuvaraj Sugapathy; M/s Sugapathy & Partners
For the 11th defendant - Tan Eng Keat; M/s Gan, Lee & Tan
For the 13th defendant - Sharon Lim; M/s JH Yee & Co
For the 14th defendant - K Dalveena; M/s Kumar Jaspal Quah & Aishah
For the 15th defendant - Jasvinder Singh; M/s Asyraf, Vivek & Wee
For the 16th defendant - Philip Ryan Mathew & Jeannie Chong; M/s Philip Mathew

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The plaintiff is a shareholder in Apex Equity Holdings Berhad ("Apex Equity"), the first defendant. It brought an action against the defendants for minority oppression under s. 346 of the Companies Act 2016. The complaint of oppression and unfair discrimination emanated from two discrete sets of transactions. The first related to certain share buy-back transactions that had been conducted by Apex Equity between 2005 and 2017. The second was the proposed merger of the stockbroking business of a subsidiary of Apex Equity, JF Apex Securities Berhad (the second defendant, which is referred to here as "JF Apex") with the business of Mercury Securities Sdn Bhd ("Mercury").

[2] Apex Equity is a publicly listed company. JF Apex is the holder of a licence issued under the Capital Markets and Services Act 2007.

[3] Apex Equity and JF Apex entered into a business merger agreement with Mercury on 18 December 2018. Under the terms of this agreement, Mercury was to transfer its stockbroking business to JF Apex. The consideration for this business transfer will be as follows:

(i) RM48 million to be paid in cash, which is to be funded by the proceeds of a private placement of new shares to be issued and allotted by Apex Equity;

(ii) RM92 million to be satisfied by the issuance of new shares in Apex Equity to Mercury.

[4] As a result of the business transfer, Mercury will emerge as the largest shareholder in Apex Equity.

[5] The business merger agreement has not yet completed. The condition precedent requiring an order of the High Court to vest the assets and liabilities of Mercury to JF Apex has not yet been fulfilled. The originating summons relating to this order is the subject of separate litigation. All other conditions precedent have been fulfilled, including the requirement to obtain shareholders' approval for the transactions contemplated by the proposed acquisition of the business of Mercury.

[6] The third to the eighth defendants were the directors of Apex Equity Berhad at the material time. The ninth to 15th defendants are the proposed placees under the private placement.

The plaintiff's Claims

[7] The gist of the plaintiff's claims was that:

(i) the share buy-back transactions were *ultra vires* the memorandum of association of Apex Equity, and the acts of Apex Equity to seek and obtain an order of the High Court validating the prior share buy-back transaction without giving adequate notice to its shareholders amounted to an act of oppression; and

(ii) the private placement exercise - which formed part of the larger transaction involving the injection of Mercury's business into JF Apex - contravened the plaintiff's rights of pre-emption under s. 85 of the Companies Act 2016, and the dilutive effects of the private placement meant that it was oppressive of the plaintiff's rights *qua* shareholder in Apex Equity; and

(iii) the business merger agreement, as well as the heads of agreement that had preceded it, contravened s. 223 of the Companies Act 2016 and as consequence were void. Section 223 requires acquisitions of undertakings or property of a substantial value or disposals of a substantial portion of a company's undertakings or property be made subject to the approval of the company in general meeting. For the purposes of this judgment, such transactions are referred to as "substantial transactions". The applicable thresholds for listed companies are specified in the Listing Requirements of Bursa Malaysia.

[8] The plaintiff also initially raised the contention that the proposed acquisition of the business of Mercury was a means by which Mercury together with the placees would acquire control over Apex Equity, which would trigger the mandatory offer obligation under the Malaysian Code on Take-overs and Mergers 2016. This argument was however abandoned in the course of oral submissions.

Summary Of The Court's Decision

[9] Having heard the submissions of the parties, I dismissed the plaintiff's originating summons with costs. The reasons are summarised as follows:

(i) in relation to the share buy-back transactions: although I accept that the plaintiff may have been deprived of an opportunity to raise its objections at the validation proceedings, I was of the view that, on the facts of this case, none of its substantive rights as a shareholder in Apex Equity had been materially prejudiced;

(ii) in relation to the contention of breach of the shareholders' statutory right of pre-emption under s. 85 of the Companies Act 2016:

(a) there had not been any contravention of the rights of pre-emption, due to the fact that the proposed placement had been approved by the shareholders of Apex Equity at its general meeting held on 20 June 2019; and

(b) it was not necessary for the circular to the shareholders of Apex Equity to expressly specify that approving the proposed acquisition of Mercury's business would amount to a waiver of the shareholders' right of pre-emption, because any reasonable incumbent shareholder would have understood that a private placement must necessarily have the effect of diluting that shareholder's interest in Apex Equity. Put another way, the failure to use a specific form of words denoting the waiver of a right of pre-emption could not amount to an act of oppression, for as long as the effects of the transaction being proposed were made reasonably clear to the shareholders of Apex Equity; and

(iii) in relation to the contention that there had been a breach of s. 223 of the Companies Act 2016:

(a) on the proper construction of s. 223(1), it suffices if either:

(1) a substantial transaction had been approved by the company in general meeting prior to the entry of the transaction; or

(2) the documentation recording the substantial transaction specifies shareholders' approval as a condition precedent.

On the facts of the present case, because the business merger agreement specified shareholders' approval as a condition precedent to completion of the proposed acquisition of Mercury's business, there had been no contravention of s. 223(1);

(b) on the true construction of s. 223(1), an arrangement or transaction is only subject to shareholders' approval if it has the effect of creating enforceable obligations on a company to either acquire an

asset of substantial value or to dispose a substantial portion of its assets. On the facts of the present case, even though the heads of agreement was expressed to be legally binding, it did not have the effect of committing the parties to the sale and purchase of the business, and was thus not subject to the requirement for shareholders' approval under s. 223(1); and

(c) even if the heads of agreement was in contravention of s. 223(1), it had been superseded by the business merger agreement, which in turn has been made subject to shareholders' approval, and hence was in compliance with s. 223(1). The heads of agreement thus no longer has any force or effect, and accordingly the question of whether the heads of agreement was void was academic; and

(d) in any event, I was not satisfied that the plaintiff had demonstrated any prejudice to its rights as a shareholder in order to avail itself of the remedies under s. 346 of the Companies Act 2016.

[10] The analyses underlying these findings are set out at paras. 22 *et seq*.

The Law Relating To Minority Oppression

[11] The applicable legal principles relating to s. 346 of the Companies Act 2016 were not in material dispute between the parties. Therefore, it suffices for me to summarise them as follows.

[12] Section 346(1) of the Companies Act 2016 provides as follows:

> Section 346. Remedy in cases of an oppression
>
> (1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground:
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

[13] Section 346(1) substantially reproduces the provisions of s. 181 of the repealed Companies Act 1965. For this reason, the case law on s. 181 would remain good authority on the scope of s. 346 of the current Act.

[14] The general principle for the governance of companies is majority rule. This principle is, unsurprisingly, subject to established exceptions: for example, parties are free to modify the operation of the principle of majority

rule by contract. Hence, not infrequently, shareholders' agreements will provide for "reserved matters" that may only be approved with unanimity or by supermajority assent. Another example is s. 346, which is a statutory intrusion into the principle of majority rule. The law recognises that, in certain circumstances, the powers of a company may be exercised in manner that is commercially unfair to a party who does not wield control over the fate and direction of the company, most usually a minority shareholder. In such cases, the law provides for wide powers of the court to provide relief to the oppressed.

[15] Thus, if the affairs of a company or the powers of its directors are being exercised in an oppressive manner or in disregard of the interests of a member or debenture holder, or an act has taken place or is threatened that unfairly discriminates against or prejudices a member or debenture holder, the jurisdiction of the court to grant its wide-ranging relief under s. 346(2) would be triggered.

[16] In order to establish a case under s. 346, a complainant must prove oppression, disregard or unfair discrimination or prejudice. There must exist commercial unfairness, or in the words of Lord Wilberforce in *Re Kong Thai Sawmill*[1] – a visible departure from the standards of fair dealing and a violation of the conditions of fair play - before a case can be made.

[17] The difference between ss. 346(1)(a) and 346(1)(b) is that the former is concerned not with particular acts but the manner in which the affairs of a company are being conducted generally, whereas the latter relates to specifically identifiable acts, whether actual or threatened. Despite the use of the present tense in s. 346(1)(a) – "are being conducted" and "are being exercised" – it is open to the court to find that oppression exists if past conduct suggests that a tendency or propensity to oppress or discriminate exists at the time of the proceedings[2]. A case for oppression can be made even if it emanates from a single act or omission, for as long as the effects of that single act or omission are such that they persist at the date of the suit[3].

[18] Whether or not there was oppression, disregard, unfair discrimination or prejudice in any particular case must be determined from the facts of each case[4]. Accordingly, a particular act in the context of one case may be held not to be oppressive conduct, but that same act in the circumstances of a different case may well be. In this regard, case law would be useful for the principles that were considered and applied, but the decision in each case must be arrived at based on the particular facts of that case.

[19] The test for unfairness is an objective one. The court must determine whether reasonable directors possessing the skills, knowledge, acumen and experience of the directors would have decided that a proposed course of action was unfair[5]. That the directors may act honestly in the best interest

of the company is not sufficient to exculpate them; the court must still apply the reasonable director test to ascertain the fairness of the conduct: *Winds Ridge Farms Ltd v. Quadra Group Investments*[6].

[20] The rights of a member or debenture holder under s. 346 accrues to that member or debenture holder personally. It is not a right exercisable by a member on behalf of the company of which he is a member. As such, where the conduct complained of is unlawful or amounts to a breach of a duty owed to the company, a member may only seek to invoke s. 346 where that unlawfulness or breach of duty also causes oppression of, unfair discrimination against, or prejudice to, the member. Without the element of unfairness or prejudice to the rights of the complainant *qua* member of the company, the breach of a duty that is owed to the company is only actionable by the member through the derivative action procedure.

[21] In the following paragraphs, the transactions giving rise to the contentions of oppression are examined in turn.

Validation

[22] As a general rule, a company is prohibited from dealing in its own shares, by virtue of s. 123 of the Companies Act 2016 and its predecessor provision, s. 67 of the Companies Act 1965. These provisions are statutory enactments of the capital maintenance rule. In 1998, the law was amended to permit publicly listed companies to buy back its own shares with the introduction of s. 67A through the Companies (Amendment) (No. 2) Act 1998. Share buy-back transactions became permitted for as long as the company in question was not insolvent, the purchase was made in good faith in the interests of the company, and the purchase was effected in accordance with the rules of Bursa Malaysia.

[23] The Listing Requirements of Bursa Malaysia generally require share buy-back transactions to be effected through the trading system maintained by the exchange.

[24] The key operative provision was s. 67A(1), which permitted a public company to repurchase its own shares provided it was authorised to do so by its own articles of association.

[25] In the present instance, it was not in dispute that the share buy-back transactions in 2005 to 2017 had been undertaken without the requisite power or capacity on the part of the Apex Equity to acquire its own shares. This was because there was no provision in the constituent documents of Apex Equity that expressly permitted share buy-back transactions. These transactions were thus *ultra vires* its memorandum and articles of association.

[26] The plaintiff discovered that the memorandum and articles of association of Apex Equity did not permit share buy-back transactions. The plaintiff brought this to the attention of the management of Apex Equity.

[27] Following this, Apex Equity commenced an originating summons on 31 July 2018 under s. 582(3) of the Companies Act 2016 to validate the prior share buy-back transactions. On 1 August 2018, Apex Equity issued an announcement on Bursa Malaysia disclosing the fact that it had filed the originating summons and setting out the orders that it was seeking to obtain from the High Court. The order was obtained on 29 August 2018.

[28] The order validated the share buy-back transactions. Although the transactions between the vendors of the shares at the material time and Apex Equity and the holding of the shares as treasury shares were validated, the order did not immunise the Apex Equity against a claim of oppressive conduct.

[29] There were two conceivable issues arising from the share buy-back transactions. The first was whether the share buy-back transactions undertaken in breach of its constituent documents amounted to an act of oppression. This was not, however, the complaint raised by the plaintiff. Rather, the argument advanced by Mr Lazar for the plaintiff was that the institution of the validation proceedings without prior notice to or consent of the shareholders amounted to an act of oppression, because it deprived the plaintiff of an opportunity to object to the validation proceedings.

[30] The complaint of the plaintiff, as explained by Mr Lazar, related to the circumstances under which the order was obtained. It was contended that Apex Equity did not inform its shareholders of the action and did not give them a reasonable opportunity to raise any objections that the shareholders may have had.

[31] In this case, the action by Apex Equity affected all the shareholders equally. There could not be said to be unfair discrimination against the plaintiff as a consequence.

[32] Nonetheless, oppressive conduct can still arise in such circumstances. I am of the view that, where the conduct affects all the shareholders equally (in that there is no discrimination against particular shareholders or class of shareholders), the conduct must be of a magnitude and quality as would materially affect a substantive right of the shareholders.

[33] The case of *Ng Chee Keong v. Ng Teong Kiat Highland Plantation Ltd*[7] provides authority for the principle that there can still be a contravention of anti-minority oppression provisions of the companies legislation even if there is no discrimination against particular shareholders or class of shareholders. In that case, a shareholder holding less than 3% of the issued shares of a company successfully petitioned the court for a Ringlet tea estate owned by the company to be sold to a third party, on account of the neglect on the part of the board of directors who had allowed the tea estate to deteriorate such

that it became in danger of becoming scrubland. Quit rent on the estate also had not been paid, as a result of which the land itself was in danger of forfeiture. The neglect on the part of the directors in that case affected all the shareholders in the company. The complainant shareholder had not been singled out by the directors, yet the court still found that the neglect on the part of the directors was actionable under s. 181 of the Companies Act 1965.

[34] On the facts of this present case, the manner in which the validation order was obtained did not impinge upon any substantive right of the plaintiff *qua* shareholder in any manner that materially affects its interests.

[35] There was no suggestion at all that the share buy-back transactions were undertaken in wilful disobedience of the memorandum and articles of association. It was an oversight. The moment that mistake was brought to the attention of Apex Equity, no further transactions were undertaken. The plaintiff did not claim that its financial or commercial interests were adversely affected by the share buy-back transactions or by the continued holding of the shares as treasury shares. Indeed, that was not its complaint: it claimed that there was oppression because the plaintiff was not accorded an opportunity to object at the validation proceedings.

[36] I was willing to accept that there had been a deprivation of the plaintiff of its right to object to the application for validation. However, even if the court in the validation proceedings had upheld the objections and refused the application for the validation order, how would the plaintiff be better off in such circumstances? Given that the share buy-back transactions must necessarily have been conducted on the open market, it would be next to impossible to reverse the transactions. The refusal of the validation order would have created even more uncertainty as to the status of the shares. Perhaps the court would have ordered the cancellation, distribution in specie or the sale of the treasury shares on application of the plaintiff. However, given that the shares only comprised - according to Mr Lazar - 3.36% of the total issued capital of Apex Equity, any such order would not have any material effect on the interests of a shareholder, much less a minority shareholder in the position of the plaintiff. For these reasons, I was of the view that any objections that plaintiff may have raised at the validation proceedings could not have made any difference to the outcome of those proceedings in a manner that would materially affect the interests of the plaintiff in its capacity as a shareholder of Apex Equity.

[37] The general principles may be summarised as follows: ordinarily, in order for a plaintiff to succeed in an action for minority oppression, it must be shown that there has been unfair discrimination against the shareholder in question. Exceptionally, a claim for oppression can still be made out where the act complained of affects all the shareholders equally, *pari passu*

to their shareholding in the company in question. In such cases, it must be shown that the conduct has materially affected a substantive right of the shareholders. An example of this would be gross mismanagement, as was the case in *Ng Chee Keong v. Ng Teong Kiat Highland Plantation*.

The Mercury Transaction

Material Background Facts

[38] As explained above, Apex Equity, JF Apex and Mercury had entered into the business merger agreement on 18 December 2018, under the terms of which Mercury would transfer its stockbroking business to JF Apex. Mercury would receive RM48 million in cash as well as RM92 million worth of shares in Apex Equity, which would result in Mercury becoming the single largest shareholder in Apex Equity.

[39] The cash portion of the consideration would be funded by the issuance of new shares to the ninth to the 15th defendants. This proposed issuance of new shares is referred to as the private placement. The private placement is effected through subscription agreements. The subscription agreements are conditional upon the same conditions precedent specified in the business merger agreement.

[40] These conditions precedent include:

(i) the approval of the Securities Commission for the transfer of Mercury's stockbroking business to JF Apex. The Commission's approval was obtained on 21 February 2019;

(ii) a vesting order having been obtained pursuant to s. 139 of the Capital Markets and Services Act 2007. This vesting order had previously been granted, but has been set aside and now fixed for re-hearing on 13 September 2019; and

(iii) the approval of the shareholders of Apex Equity for the transactions contemplated by the transfer of Mercury's business to JF Apex. The shareholders' approval was obtained at a general meeting of Apex Equity held on 20 June 2019.

[41] The business merger agreement was preceded by a heads of agreement, signed between Apex Equity and Mercury. The heads of agreement was signed on 21 September 2018. It sets out the salient terms of the business merger agreement, including the condition precedent relating to the approval of the shareholders of Apex Equity. The heads of agreement was expressed to be legally binding.

Section 85

[42] The plaintiff contended that the private placement of the new shares to be issued to the placees contravened s. 85 of the Companies Act 2016. It was advanced for the plaintiff that the effect of the proposed private placement would be to dilute the plaintiff's shareholding in Apex Equity, which meant that the proposed private placement was an act of oppressive of the plaintiff.

[43] Section 85 provides as follows:

> 85 Pre-emptive rights to new shares
>
> (1) Subject to the constitution, where a company issues shares which rank equally to existing shares as to voting or distribution rights, those shares shall first be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders.
>
> (2) An offer under subsection (1) shall be made to the holders of existing shares in a notice specifying the number of shares offered and the time frame of the offer within which the offer, if not accepted, is deemed to be declined.
>
> (3) If the offer is not accepted after the expiry of the period specified in the notice under subsection (2), the directors may dispose those shares in such manner as the directors think most beneficial to the company.

[44] Section 85 creates a statutory right of pre-emption. This provision however permits a company to issue shares otherwise than pro-rata to the existing shareholders if the constitution of the company in question permits it.

[45] The material portion of article 11 of Apex Equity's articles of association provides as follows:

> Subject to any direction to the contrary that may be given by the Company in general meeting, all new shares or other convertible securities shall be offered to such persons as at the date of the offer are entitled to receive notices from the Company in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled.

[46] Subsequent to the filing of this action, Apex Equity had proceeded to hold its extraordinary general meeting at which the business merger with Mercury was approved by the majority of the shareholders.

[47] I am of the view that the resolution passed by the company in general meeting approving the business merger (which included the proposed placement as part of it) amounted to a "direction to the contrary that may be given by the company in general meeting" for the purposes and within the

meaning of article 11. A "direction" that is given by the company in general meeting must necessarily mean a resolution passed at a meeting of the shareholders; there is no other reasonable construction of article 11.

[48] It was advanced for the plaintiff that the approval of the shareholders at the general meeting was ineffective to amount to a "direction to the contrary" for the purposes of article 11 because the shareholders' circular made no mention of article 11 and because the shareholders had not been expressly asked to waive their statutory and contractual rights of pre-emption. In other words, the contention was that the failure by Apex Equity to properly inform the shareholders that the approval of the business merger proposal would be tantamount to a waiver of their rights of pre-emption amounted to an act of oppression, as the effects of the proposed transaction would be dilute the shareholding of the existing shareholders in the company.

[49] I found myself unable to agree with this contention for the following reasons:

(i) the shareholders have approved the issuance of the placement shares to the placees, which by its very nature would result in a dilution of the holdings of the existing shareholders. A reasonable person in the position of a shareholder could not have failed to understand the dilutive effects of the private placement. The fact that the shareholders in general meeting had approved for their holdings to be diluted meant that they were prepared to accept the consequences of the proposed transaction, perhaps in the hope and belief that the resultant merger would be beneficial to their interests in the long run. If the shareholders as a whole were prepared to accept that their holdings would be diluted, then the fact that the circular did not spell out that the approval of the transaction would have the effect of waiving their rights of pre-emption would be of no particular consequence. What matters, to my mind, was that the effects and consequences of the proposed transaction was adequately explained in order for the shareholders to make an informed decision regarding the transactions under contemplation. For as long as they knew that the effect of the transaction would be a dilution of their shareholdings (or at least that there was adequate explanation of the dilutive effects of the proposed transaction), then that was all that mattered for their resolution to take effect as a "direction to the contrary" within the meaning of article 11;

(ii) secondly, an oppression action under s. 346 of the Companies Act 2016 is not a class action undertaken by one shareholder for the benefit of the shareholders as whole. Thus the plaintiff cannot claim that it was oppressed because the shareholders as a whole was not informed of their right of pre-emption. What matters is whether the plaintiff knew that an

approval of the transaction would effectively result in a waiver of its pre-emptive rights. It clearly did, for that was the basis upon which it sought to challenge the proposed business merger even before the general meeting was convened. In other words, the plaintiff cannot complain that it was not told of the existence of its pre-emptive rights and that the approval of the transaction would result in an effective waiver of its pre-emptive rights, because it knew this all along.

The argument may be raised that, had the shareholders as a whole been informed of the pre-emptive rights and of article 11 of the articles of association, they may have voted differently. (I note in this regard that this was not an argument that the plaintiff sought to advance in this case, but I address it here nonetheless for the sake of completeness.) I am of the view that this argument would have failed for want of proof. No other shareholder has come forth in this case to testify that he or she had been misled by the purported non-disclosure by Apex Equity or its advisors; and

(iii) thirdly but no less significantly, a majority of the shareholders have already approved the proposed business merger transaction. The plaintiff may well disagree with the decision of the majority, but this disagreement in and of itself should not entitle the plaintiff to frustrate the will of the majority. In this regard, it would be instructive to recall the words of Siti Norma J in *Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Berhad & Ors*[8]:

> The mere fact that one or more of those managing the company possess the majority of the voting power and, in reliance upon that power, make policy or executive decisions with which the complainant does not agree, is not enough. Those who take interest in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked.

For the reasons explained in the preceding paragraphs, I am of the view that none of the allegations of oppression has been made out in respect of the purported contravention of s. 85, which meant that the plaintiff must abide by the wishes of the majority.

Section 223

[50] It was advanced for the plaintiff that the heads of agreement entered into by Apex Equity with Mercury for the acquisition by Apex Equity of the stockbroking business of Mercury was in contravention of s. 223 of the Companies Act 2016, and as a consequence, the business merger agreement that superseded the heads of agreement ought to be set aside.

[51] Section 223(1) of the Companies Act 2016 provides as follows: A

(1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for:

(a) the acquisition of an undertaking or property of a substantial value; or

B

(b) the disposal of a substantial portion of the company's undertaking or property unless:

(A) the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or

C

(B) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution.

[52] The first observation on this section is that the two conditions set out in paras. (A) and (B) are clearly intended to qualify both paras. (a) and (b) of sub-s. (1). This was not in dispute between the parties in the action before me. I would add that this is the only reasonable conclusion as a matter of the proper construction of s. 223(1), as the contrary construction - which is that there is a blanket prohibition against directors entering into an acquisition of an undertaking or property of a substantial value - would lead to an absurd result. D

[53] In my view therefore, s. 223(1) should be taken to be read in the following manner: E

(1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for:

(a) the acquisition of an undertaking or property of a substantial value; or F

(b) the disposal of a substantial portion of the company's undertaking or property,

unless:

G

(A) the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or

(B) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution.

[54] The equivalent provision under the repealed s. 132C of the Companies Act 1965 was worded slightly differently. Under the new section, even the entry of transaction of substantial nature is now subject to regulation, whereas before the scope of the prohibition was only against directors carrying into effect a substantial transaction that was not duly approved by the shareholders in general meeting. Shareholders' approval must be specified as a condition precedent to any arrangement or transaction of a substantial value, failing which the arrangement or transaction would be void pursuant to s. 223(5). H I

[55] The following table compares the two provisions side by side:

Section 223(1) of the Companies Act 2016	Section 132C(1) of the repealed Companies Act 1965
(1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for: (a) the acquisition of an undertaking or property of a substantial value; or (b) the disposal of a substantial portion of the company's undertaking or property unless: (A) the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or (B) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution.	(1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for: (a) the acquisition of an undertaking or property of a substantial value; or (b) the disposal of a substantial portion of the company's undertaking or property, unless the arrangement or transaction has been approved by the company in a general meeting.

[56] The other notable difference is the use of the phrase "approved by the company by way of a resolution" instead of "approved by the company in a general meeting". In my view, no change in meaning had been intended by the use of the different form of words. Clearly, s. 223 intended to continue to make substantial transactions subject to the requirement for shareholders' approval.

[57] It was argued by Mr Tang for the plaintiff that s. 223(1) meant that the heads of agreement, which he observed did not contain shareholders' approval as a condition precedent, was void. This was because its entry had not been made subject to shareholders' approval. Furthermore, because the business merger agreement carried into effect the terms of the heads of agreement, it too was void.

[58] I was unable to agree with this contention. The reasons are as follows:

(i) Read literally, 223(1)(A) requires the entry into of any arrangement or transaction to be made subject to approval of the shareholders.

If the entry into of any transaction must be made subject to the approval of shareholders, it then follows even agreements that are made conditional upon the shareholders' approval having been obtained would be in contravention of sub-para. (A). This is because such an

agreement would have already been entered into prior to obtaining shareholder approval. This effectively means that the only way in which sub-para. (A) would be fulfilled is if shareholders' approval was obtained before any documentation was executed between the parties.

Now, this would be possible in some but not all cases. Take for example, the situation where the target assets are shares in a listed company, and where the proposed acquirer is itself a listed company. Section 223(1)(A) would appear to require the acquirer to first convene a general meeting to obtain its shareholders' approval even before committing the vendor to the sale. Now, once the information relating to the proposed acquisition is set out in the circular to the shareholders of the acquirer, that information - which can reasonably be expected to be price-sensitive information - would enter the public domain. It can then be expected that the market price for the shares in the target company would move and potentially affect the willingness of the vendor to sell the shares in the first place.

The commercial reality and practice are that transactions of such nature must be kept confidential until there is some commitment to a price, either in form of a memorandum of understanding or other preliminary agreement. Thereafter, an announcement is made to Bursa Malaysia, in compliance with the continuous disclosure obligations imposed on listed entities. The parties would then proceed to prepare formal documentation to record the terms of their agreement, with shareholder approval being specified as a condition precedent if the applicable substantial transaction thresholds are anticipated to be triggered.

For this reason, I am of the view that on the true construction of s. 223(1), it suffices if just one of the conditions in sub-paras. (A) or (B) is fulfilled. This stands to reason because, as explained above, it would not be commercially practicable or desirable for shareholders' approval to be obtained prior to the entry of all arrangements or transactions of a substantial nature. In some cases, there will be a need to preserve the confidentiality of the transaction until the terms of the transaction are sufficiently certain and crystallised. On this reading, s. 223(1) is satisfied either where the shareholders' approval has been obtained upfront, ie, before any document is executed between the parties, or where shareholders' approval has been made a condition precedent to the effectiveness of the rights and obligations relating to the substantial transaction. Thus, s. 223(1) would be satisfied if, as in the present case, the business merger agreement has been made subject to shareholders' approval having been obtained;

(ii) Secondly, I was of the view that, on the true construction of s. 223(1), an arrangement or transaction is only subject to shareholders' approval if it has the effect of creating enforceable obligations on the company to either acquire an asset of substantial value or to dispose a substantial portion of its assets.

On the facts of the present case, even though the heads of agreement was expressed to be legally binding, it did not have the effect of committing the parties to the sale and purchase of the business. The parties could have still walked away from the deal if they could not agree on the detailed terms of the business merger agreement, to the extent that any such term has not been set out in the heads of agreement. The heads of agreement was nonetheless still legally binding, and imposed an obligation on the parties to utilise their efforts to finalise and execute the business merger agreement. To the extent that a party has failed to comply with this obligation, the other party has a right to claim for damages reflecting the costs that it had incurred in pursuing the sale and purchase of the business. Nonetheless, this did not mean that the heads of agreement created enforceable obligations for the sale and purchase of Mercury's business. In as far as the sale and purchase of the business was concerned, the parties had anticipated that formal legal documentation would be entered into between them to record the full terms of the sale and purchase. Thus, in relation to the sale and purchase of the business, the heads of agreement merely constituted an agreement to agree, and would not be enforceable as contractual rights or obligations.

The point here is that an agreement can constitute an enforceable contract in respect of some of the matters contained within it, but may nonetheless be merely an agreement to agree with respect to other matters.

On the facts of the present case, because the heads of agreement did not create enforceable obligations with respect to any substantial transaction, the requirement for shareholders' approval would not be triggered for its entry or execution;

(iii) Thirdly, even if the heads of agreement was in contravention of s. 223(1), the business merger agreement has been made subject to shareholders' approval, and hence was in compliance with s. 223(1). By the terms of the heads of agreement itself, the business merger agreement supersedes the former once it was executed. This meant that heads of agreement no longer has any force or effect. Thus the question of whether the heads of agreement was void was academic; and

(iv) Finally, even taking the plaintiff's case at its maximum, there must still be prejudice or oppression. There cannot conceivably be prejudice to the plaintiff, if as Mr Tang concedes, Apex Equity could have arrived at exactly the same position had it made the heads of agreement subject to shareholders' approval. No commercial or regulatory purpose would have been served by requiring shareholders' approval to be obtained twice in respect of the same transaction.

[59] For the reasons explained in this judgment, the plaintiff's originating summons was dismissed with costs.

Endnotes:

1. [1978] 1 LNS 170; [1978] 2 MLJ 227; [1978] 1 MLRA 235
2. *ibid*. at 229F, per Lord Wilberforce
3. *per* Gopal Sri Ram JCA in *Owen Sim Liang Khui v. Piasau Jaya & Anor* [1996] 4 CLJ 716; [1996] 2 AMR 2477; [1996] 1 MLJ 113; [1995] 2 MLRA 461
4. *ibid*. at 737i (CLJ)
5. *Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors* [1993] 1 LNS 32; [1994] 1 AMR 381; [1994] 1 MLJ 520 at 536G; [1993] 5 MLRH 440
6. 178 DLR (4th) 603
7. [1979] 1 LNS 59; [1980] 1 MLJ 45; [1979] 1 MLRH 271
8. [1993] 1 LNS 32; [1994] 1 MLJ 520; [1993] 5 MLRH 440